No. 7017

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HOO GAN TZE,

Appellant,

vs.

EDWARD L. HAFF, as Acting Commissioner of Immigration of the Port of San Francisco, California,

Appellee.

BRIEF ON BEHALF OF APPELLANT

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

FRANK J. HENNESSY,
Grant Building, San Francisco,
MARSHALL B. WOODWORTH,
Thomas Clunie Building, San Francisco,
Attorneys for Appellant.

Subject Index

Table of Authorities Cited

No. 7017

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HOO GAN TZE,
Appellant,

vs.

EDWARD L. HAFF, as Acting Commissioner of Immigration of the Port of San Francisco, California,
Appellee.

BRIEF ON BEHALF OF APPELLANT

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This is an appeal from an order of the United States District Court in and for the Southern Division of the Northern District of California, denying a petition for a writ of habeas corpus.

STATEMENT OF THE CASE.

The assignments of error specify:

First. The Court erred in denying the petition for a writ of habeas corpus;

Second. The Court erred in holding that it had no jurisdiction to issue a writ of habeas corpus;

Third. The Court erred in holding that the allegations in the petition for the writ and the facts presented upon the issues made and joined therein were insufficient in law to justify the issuance of the writ of habeas corpus and a hearing thereon;

Fourth. The Court erred in holding that there were serious discrepancies justifying a denial of the petition for the writ of habeas corpus. (Tr. 64-65.)

These assignments really raise but two questions for the decision of this Honorable Court:

First. Was the lower Court justified in refusing to issue the writ of habeas corpus without a consideration of *all* of the evidence and record of proceedings before the immigration officials instead of confining itself to a mere consideration of "certain excerpts" of testimony appended to the "appearance of respondent and notice of filing excerpts of testimony from the original Immigration Record"? (Tr. 17-56.)

Second. Are the discrepancies appearing in these "certain excerpts" of sufficient importance to offset the sworn averments in the petition as to the citizenship of the appellant? (Tr.—Petition for Writ of Habeas Corpus,—1-15.)

The petition for a writ of habeas corpus was filed and sworn to by Hoo Loy, the father of the appellant Hoo Gan Tze. It alleged, among other things:

> "That the said Hoo Gan Tze is the blood son of your petitioner, Hoo Loy, a native-born citizen of the United States; that the citizenship of your

petitioner has been conceded by the Department of Labor; that the said detained, Hoo Gan Tze, being the blood son of your petitioner, by virtue of Section 1993 of the Revised Statutes of the United States, is a citizen thereof; that the detained is accorded upon his application for admission a hearing before a Board of Special Inquiry of the Immigration Service; that your petitioner, detained's father, and also the detained's mother, two prior landed brothers and a prior landed sister, of the detained, appeared as witnesses and testified for and on behalf of the detained, and the aforesaid testimony, together with the records of the family now in the files at the Bureau of Immigration, was considered by the aforesaid Board of Special Inquiry; that the Board of Special Inquiry denied admission to the detained; (Tr. 3-4) * * *

That your petitioner further alleges that the records of the Immigration Bureau are conclusively favorable to the detained. That said detained was born in 1907 and the first mention of the fact that he was the blood son of your petitioner and his wife, Yee Shee, was made in 1911; that thereafter, in appearances and testimony given by various members of the family he has always been mentioned and referred to as the blood son of your petitioner.

That word was first received of the Department of Labor's decision April 8, 1932, and your petitioner was informed that deportation would take place on the same day, viz: April 8th, 1932, at 4 o'clock P. M., ex steamship 'President McKinley'.

That your petitioner has not had time, owing to the sudden notice of the order of deportation and the proximity of the sailing of the steamship

'President McKinley,' to secure copies and excerpts from the Immigration Records of the Department of Labor, with the exception of Exhibits heretofore attached; that as soon as possible, your petitioner will present the same to the Court for its consideration.

That a copy of a brief of counsel for the detained filed with the Department of Labor, marked Exhibit 'A,' and a copy of a Summary of the Board of Special Inquiry, marked Exhibit 'B,' are attached hereto and made a part hereof."
(Tr. 4-5.)

The respondent entered his appearance and contented himself with presenting "*certain excerpts* of testimony from the original Immigration Record additional to the portions of such records which are set out in the petition for writ of habeas corpus herein." (Tr. 17-56.)

Inasmuch as the appellant, owing to the fact that he had but a few hours in which to prepare and file his petition for a writ of habeas corpus or be deported, was unable to append any testimony whatsoever, it is plain that no testimony whatsoever favorable to him was set out in the petition for the writ.

It goes without saying that the respondent simply appended to his appearance those "certain excerpts" of testimony favorable to his contention, contending that the petition for the writ should be denied because of certain alleged discrepancies.

At the hearing on the order to show cause why the writ should not issue, it does not appear that the original record of the immigration officials containing

all of the testimony and evidence was introduced in evidence. (Tr. 58-59.)

The "Order," as to "The Form of Petitions for Writs of Habeas Corpus," promulgated by the lower Court on November 28, 1926, as one of its rules, expressly provides:

> "In the event that it appears to the court that the petition for the writ does not in fact furnish sufficient information, the court *may, upon its own motion, call for the original record.* The Immigration Service *will not be requested to produce the original record except under these circumstances.* Counsel should discontinue their practice of stating in the petition that they stipulate that the record be considered part of the petition, except where the facts pleaded show that material portions of the record *are not in fact available.*" (iv-v, Appendix to Brief.)

The allegations of the petition,—that material portions of the record were not in fact available,—brought the present case clearly within the above rule. (Tr. 5.) The then counsel for appellant had but a few hours within which to hurriedly prepare a petition for a writ of habeas corpus to avert deportation. The only available portions of the departmental record were a copy of brief of counsel for detained filed with the Department of Labor and a copy of the Summary of the Board of Special Inquiry, which were appended to the sworn petition.

But, in spite of this situation and of the express provisions of the above "Order" or Rule, neither the Court below, *"upon its own motion,"* called for the

original record, nor did the respondent produce the original record. (Tr. 58-59.)

In view of the circumstances under which the petition for the writ was prepared and filed and in view of the fact that appellant could not obtain the production of the necessary testimony and documents in support of his contention, that he was the blood son of a citizen of the United States, it is contended that the hearing before the lower Court was so abortive as to amount to no hearing at all. It is evident, that the appellant was completely at the mercy of any excerpts of testimony which the respondent chose to set forth in his so-called "Appearance". (Tr. 17-56.)

How the lower Court could intelligently, or at all, pass upon or determine the merit of the petition for the writ, setting up that the appellant was the blood son of a citizen of the United States, without having the *entire* original departmental record before it for consideration, is difficult to understand. In this respect it is contended as a ground for reversal and for at least the issuance of the writ of habeas corpus, that the method of hearing had in the lower Court was no hearing at all, or such an abortive one as not to amount to any hearing.

As to the facts, as taken from the sworn petition, it may be said that the identity of the appellant, as the blood son of Hoo Loy and of his wife, Yee Shee, was conclusively established. It was testified to by himself. It was substantiated by the testimony of his father, himself a native-born citizen, born in San Francisco, California, and now living in the United States. It was also substantiated by the testimony

of his mother, who first came to the United States in 1922 and who has not since been in China. It was also substantiated by the testimony of his brother, Hoo Ging Pon, age 20 years. It was also substantiated by the testimony of his sister, Hoo Ngook Lon, age 24 years. It was further substantiated by the testimony of another brother, Hoo Gwing Sen, age 28 years. (Tr. 18.) We, therefore, have 5 persons, all now living in the United States, who testified to the relationship and identity of the appellant. (Tr. 3-6; 8-12.)

The prior records of the Government are also conclusively favorable in establishing the legitimacy of appellant's claim of relationship and citizenship. The appellant was born in 1907, and ever since 1911 has been named and claimed as a member of this family,—as a son of Hoo Loy and his wife, Yee Shee,—by all members thereof who have repeatedly appeared before the immigration officials. The first mention by these members of the family of the appellant was in 1911, now some *twenty years ago.* (Tr. 11.)

The description given for the appellant on these many prior occasions by the father, mother, two brothers and sister is in agreement with the appellant as he appears in person, so far as can be developed from the allegation of the petition and of the excerpts of respondent. (Tr. 11.)

Further, a comparison of photographs of the various members of this family, as contained in the original Immigration Records, will show a good general resemblance between them, a resemblance which is further evidence of the relationship. (Tr. 11.)

The discrepancies, referred to in the Summary of the Board of Special Inquiry and reproduced in the excerpts by respondent, are not of a serious nature and relate to collateral matters and are such as might well take place, considering the age of the appellant—only seven years—at the time. At any rate, they are not such as should outweigh the conclusive evidence as to identity and family relationship and resemblance. (For Summary see Tr. 12-15.) (For excerpts see Tr. 17-56.) (For brief on behalf of appellant before Department of Labor, see Tr. 8-12.) Nor are they such as should overcome the sworn allegations set out in the petition for the writ of habeas corpus.

ARGUMENT.

First.

Was the lower Court justified in refusing to issue the writ of habeas corpus and in not granting a hearing to the appellant without a consideration of ALL of the evidence and record of proceedings before the Immigration Officials instead of confining itself to a mere consideration of excerpts of testimony appended to the "Appearance of respondent and notice of filing excerpts of testimony from the original Immigration Record"?

It is contended, on behalf of the appellant, that the hearing had in the lower Court, on the order to show cause why the writ should not issue, was abortive for any purpose. It was no hearing at all. It was a mere semblance of a hearing.

In a case involving a claim of citizenship, the lower Court, on habeas corpus, is not limited to a mere casual review of the departmental record, but it is in duty bound to issue the writ in order to test the jurisdiction of the Department of Labor—in order to determine the jurisdictional question as to whether the detained is a citizen of the United States.

As was well said by the Circuit Court of Appeals for the Sixth Circuit in the two cases of *Chin Hoy v. United States* and *Chin Lund v. United States,* 293 Fed. 750, *751-752:*

> "The principal contention on the part of the appellants is that the Department of Labor did not have jurisdiction, for the reason that each of the appellants claimed to be a citizen, and supported their respective claims by evidence which, if believed, would be sufficient to entitle them to a finding of citizenship. In the disposition of this question it is unnecessary to review the numerous decisions to which our attention has been called by counsel for the appellants and for the United States.
>
> On the 29th of May, 1922, the Supreme Court held, in the case of Ng Fung Ho v. White, 259 U. S. 276, 42 Sup. Ct. 492, 66 L. Ed. 938, that jurisdiction in the executive to order deportation exists only if the person arrested is an alien, that the claim of citizenship is a denial of an essential jurisdictional fact, and that in such cases a writ of habeas corpus will issue to determine this status. Ex parte Reed, 100 U. S. 13, 25 L. Ed. 538; In re Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 644; Johnson v. Sayre, 158 U. S. 109, 15 Sup. Ct. 771, 39 L. Ed. 914." * * *

While in this case it is claimed by the government that these appellants entered the United States surreptitiously (U. S. v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354), and for that reason the Fifth Amendment to the Constitution does not afford them protection in its guaranty of due process of law, nevertheless, the Supreme Court in the case first above cited, held that when a prisoner claims citizenship, and makes a showing that his claim is not frivolous, the jurisdiction of the Department of Labor may be tested in the courts by means of habeas corpus.

These appellants claimed that they were born in the United States, and offered some substantial evidence in support of their claims of citizenship. That being true, it cannot be said that their claims in that regard are frivolous, even though the departmental officers did not believe the witnesses who testified on behalf of the appellants in support of their claims.

Nor do we think that the requirement for a judicial hearing is satisfied where the judge on the habeas corpus hearing searches the record of the deportation proceedings and forms therefrom his own conclusion that the claim of citizenship is untrue. Such departmental proceedings are not judicial, and a quasi appellate review by a court does not make them so. * * *

Applying this latest decision of the Supreme Court in Ng Fung Ho v. White, supra, to the facts in this case, it follows that the judgment of the District Court must be reversed, and the cause remanded for trial in that court of the question of citizenship, and for further proceedings in conformity with this opinion."

See, also, on the general proposition, *De Lima v. Bidwell,* 182 US..1.

As was also well said by this Court in *Wong Hai Sing v. Nagle,* 47 F. (2) 1021:

> "Appellant contends also that the lower Court erred in not trying the case on its merits after it had issued the writ of habeas corpus and after taking jurisdiction thereof. *When a question of citizenship is involved, the District Court may properly undertake to determine the alien's right to enter the country.*"

And in *Wong Bing Pon v. Carr,* 41 F. (2d) 604, *606,* this Court again stated:

> "The privileges of citizenship are not to be lightly denied to an applicant for admission to this country.
>
> It is well settled that, when a claim of citizenship, which is more than colorable and presents a real question, is denied by the Immigration tribunals, the courts will scrutinize the proceedings with great care to the end that American citizens shall not be unjustly deprived of their citizenship. 'It is better that many Chinese immigrants should be improperly admitted than that one natural-born citizen of the United States should be permanently excluded from his country.' Clarke, J., Kwock Jan Fat v. White, 253 U. S. 454 at 464, 40 S. Ct. 566, 570, 64 L. Ed. 1010. See, too, In re Can Pon, 168 F. 479 (C. C. A., 9th)."
>
> *Flynn ex rel. Lum Hand v. Tillinghast, Commissioner of Immigration,* 62 Federal Reporter, 2d Series, 308.

> "Whether one is an alien or not touches the jurisdiction of the executive officer to act, and the executive conclusion on that fact is open to judicial inquiry on habeas corpus."
>
> *Lindsey, Immigration Inspector, v. Dobra,* 62 Federal Reporter, 2d Series, 116.

In the case at bar, the appellant had no hearing at all before the lower Court on the merits of his sworn claim that he was a citizen of the United States. He was at least entitled to the issuance of the writ so that the lower Court might receive and consider the evidence he had to offer in support of his claim of citizenship. He had no hearing whatever upon the facts set up in his sworn petition. As was stated by the United States Supreme Court, in *Fallbrook Irr. Dist. v. Bradley,* 164 U. S. 112, *171,* 41 L. Ed. 369, *393:*

> "When the act speaks of a hearing of the petition, what is meant by it? *Certainly it must extend to a hearing of the facts stated in the petition."*

Is it, we ask, a hearing of the facts set forth in the petition for the writ of habeas corpus, to limit the consideration thereof only to such excerpts from the departmental record as respondent chooses to set forth?

Are the sworn allegations of the petition, setting forth the facts as to the citizenship of the detained, to be overcome by garbled, scattered and sporadic excerpts appended to a mere appearance by respondent?

It must be evident to this Honorable Court that the appellant had no hearing at all in the lower Court on his petition for a writ of habeas corpus based upon the jurisdictional question of citizenship.

The present counsel, who represent the appellant on this appeal, have had occasion, on previous appeals in Chinese habeas corpus cases, to complain of the practice and method of pleading pursued by the legal representatives of the respondent—Commissioner of Immigration—in Chinese habeas corpus matters.

Instead of pursuing the practice and method of pleading known for hundreds of years to the common law and recognized by the most approved forms of code practice and pleading, they have adopted a method of their own which is unique, to say the least. Instead of demurring to the petition for a writ of habeas corpus, if a demurrer be justified by the allegations of the petition, or of answering the allegations of the petition and thus framing an issue of fact, they content themselves by merely entering an appearance and appending to this appearance such excerpts from the departmental records as suit their whim or caprice. Such loose practice and abortive pleading is sanctioned in no other district so far as we know. It is a denial of due process of law. It effectually prevents a detained, basing his petition on the ground of citizenship, from getting any fair hearing or any hearing at all.

Take the situation in the case at bar. The petition, sworn to by the father of the detained, alleges facts establishing the citizenship of his son, the detained and appellant. Owing to a situation over which he

had no control, the then attorney for the appellant was unable (as alleged in the petition, Tr. 5) to incorporate as part of the petition "the essential part of the proceedings upon which petitioner relies" (see "Order" or Rule of lower Court above set forth; see Appendix for "Order" or Rule set out in full). The respondent enters his appearance and appends thereto such excerpts as he chooses to refer to, which confessedly, are all favorable to his contention that discrepancies exist. Although the "Order" or rule of the lower Court provides that, in such an event, "the Court may, upon its own motion, call for the original record," we find, as disclosed by the transcript of record (Tr. 58-59), that the lower Court did not call for the original record and denied the petition for the writ of habeas corpus solely on the excerpts appended to the appearance of respondent.

Can this be called a *full* hearing? Can it be called a *fair* hearing? Can it be termed a hearing at all? Is it not a mere semblance of a hearing?

In this state of the record, neither an issue of law nor of fact was presented to the lower Court. We ask, do not the sworn averments of the petition, alleging that the appellant is the blood son of a citizen of the United States, far outweigh the garbled, scattered and sporadic excerpts appended to the "appearance" of respondent?

We deprecate this innovation in pleading and practice pursued by the respondent and apparently approved by the lower Court as a practical denial of justice. As was well said in *Henry v. United States,* 263 Fed. 462:

> "No new or advanced thought has entered into our system of jurisprudence which justifies the court in departing from those long-established safeguards with which the law surrounds the citizen when faced by his accusers at the bar of justice."

We respectfully submit that the hearing on the order to show cause held by the lower Court upon the incomplete and garbled record presented before it, without the benefit of the *entire departmental record,* does not satisfy the well-recognized rule, laid down by the United States Supreme Court in the leading case of *Ng Fung Ho v. White,* 259 U. S. 276, 66 L. Ed. 938, and invariably followed by other Federal Courts, that, in a case involving citizenship, the detained is entitled to the issuance of the writ of habeas corpus and to a hearing thereon, and that a mere hearing on an order to show cause to determine the sufficiency of the allegations of the petition, such as took place in the case at bar, is not tantamount to a hearing in a court of justice on the jurisdictional question of citizenship.

In this regard, we submit that the decision of the lower Court should be reversed and that Court instructed to issue the writ of habeas corpus and grant a hearing thereon upon the jurisdictional question of citizenship.

SECOND.

Are the discrepancies appearing in the excerpts appended to the appearance of respondent of sufficient importance to offset the sworn averments in the petition as to the citizenship of the appellant?

The discrepancies pointed out in the excerpts of the testimony are of minor importance and would not of themselves be sufficient to justify the exclusion order of the Board.

Thus, in the case of *Wong Hai Sing v. Nagle,* 47 Fed. (2d) 1021, this Court, in discussing this matter, said:

> "The Courts have held that in long and involved cross-examination of several persons covering minutiae of daily life, discrepancies are bound to develop and are inconclusive with regard to the testimony as a whole when they are on minor points."

Thus, in regard to the matter of the age of Hoo Gan Tze, the applicant, his father, Hoo Loy, testified on March 22, 1911, that the applicant was born on May 30, 1907. On March 23, 1914, Hoo Loy testified that the applicant was born on March 9, 1906. On November 1, 1917, Hoo Loy testified that the applicant was born on March 28, 1907. On October 7, 1931, Hoo Loy also testified that the applicant was born on March 28, 1907. This latter date, March 28, 1907, is the date that the applicant himself gave as the time of his birth. It is also the date of his birth as given by his mother, Yee Shee.

These variations as to the date of the birth of the applicant given by Hoo Loy, his father, on March 22,

1911, and on March 11, 1914, are of no particular importance. Any person under similar circumstances might have made a similar mistake. The testimony given by Hoo Loy as to the date of the birth of the applicant on November 1, 1917, and on October 7, 1931, coincided with the date as given by the applicant and by his mother, Yee Shee.

There was manifest in the examination of the witnesses as to the birth-date of the applicant, a disposition to predetermine this case adversely to the applicant. This is apparent from the following question that was asked Hoo Loy, the father of the applicant:

> "Q. The fact that you have given these different birthdates for your second son while always being consistent as to the birthdates of your other alleged children and that you have left this alleged son in China for many years after bringing all the rest of your children to this country indicates that you really have no such son or that if you did have such a son he has died. Have you any explanation to give?
>
> A. I left that son home until now so that he could attend Chinese school and to manage the affairs at home; as far as I can recall I have always given the birthdate as I have given it today."
>
> (Tr. 22.)

An examination of the excerpts will show that the question was not a fair one because the witness had not always been consistent as to the birth-dates of his other children. On March 22, 1911, Hoo Loy gave the birth-date of his child, Hoo Sin, as KS

31-2-15. On March 23, 1914, he gave the birth-date of Hoo Gwing Sin as KS 30-1-10. On November 1, 1917, he gave the birth-date of Hoo Gwen Sin as KS 31-1-10. (Tr. 19-21.)

Hoo Loy, the father of the applicant, testified on October 7, 1931, that his father had died at Tung Sing Village about six years ago and that his mother died at the same place in the year 1914. At that time the applicant was a boy about seven years of age. In giving his testimony in connection with the present application on October 9, 1931, the applicant first testified that he had not seen either of his paternal grandparents. He later corrected this testimony, stating that he had made a mistake; that his paternal grandfather was Hoo Ming Fong and that he had died some ten years ago at Tung Sing Village. He stated that he did not mean to say that he had not seen his paternal grandfather, but that he had not seen his paternal grandmother. In view of the age of the applicant at the time of his paternal grandmother's death, it might well be that he had forgotten her. (Tr. 26.)

The applicant's testimony as to the names of his paternal grandfather and paternal grandmother was corroborated by the testimony of his mother, Yee Shee, and by the testimony of his brother, Hoo Gong Pon, and by the testimony of his sister, Hoo Ngook Lon, and by the testimony of his brother, Hoo Gwing Sen. (Tr. 23-28.)

In regard to the maternal grandparents, Hoo Loy, the father of applicant, on October 7, 1931, testified that his wife's father was dead, but that her mother

was living. Hoo Gan Tze on October 9, 1931, testified to like effect. He stated that he had never seen his maternal grandfather, but that he had seen his maternal grandmother when he was a very small boy. (Tr. 28-29.)

His testimony may be correct. Not having the complete record before us, it is impossible to state whether or not the witness ever had any opportunity of seeing his maternal grandfather, and it may well be that he only saw his maternal grandmother when he was a very small boy.

As to his brothers and sisters, Hoo Loy, the father of the applicant, stated that he had one brother and no sisters; that his brother's name was Hoo Gim, Hoo You Hing, Hoo Gim Leung; that his brother was married and had a wife named Yee Shee. The applicant testified that his father's brother had a wife named Yee Shee, fifty years of age, and that she was dead; he stated that he did not recall ever seeing his uncle's wife.

Hoo Ging Pon, the brother of the applicant, testified that Yee Shee, his uncle's wife, is now living in Tung Sing Village. The applicant testified that she died a long time ago. This conflict is upon a purely collateral matter and cannot be permitted to overcome the positive testimony of the father and mother and brothers and sister of the applicant as to their relationship to the applicant, as appears in the Immigration Records, extending back to the year 1911.

As to the family of his brother, Hoo Loy, the father of the applicant testified that his brother had four sons and one daughter. Yee Shee, his wife, testified

that Hoo Loy's brother had four sons and one daughter when she came to the United States, which was in 1922. Hoo Ging Pon, the brother of the applicant, testified that his father's brother had seven sons and one daughter. The applicant, Hoo Gan Tze, testified that his father's brother had six sons and one daughter and he gave the names and ages of the children and his testimony in this regard is corroborated in a large measure by the testimony of Hoo Ging Pon and Hoo Loy.

It is true that Hoo Loy, the father, gave the family as consisting of four sons and one daughter, but he has not been in China since March, 1914, so he could scarcely be expected to know of the children, Hoo Way Jong, 10 years of age, and Hoo Way Keung, nine years of age. (Tr. 34-36.)

Hoo Ging Pon, the brother of the applicant, testified that on his trip to China in 1923-1927 he did not live in the same house with the applicant in the Tung Sing Village. He is contradicted in this respect by the applicant, who states that he did occupy the 5th house in the 2nd row in the Tung Sing Village with him. However, the testimony of the applicant is corroborated by the testimony of Hoo Ging Pon as to the time when he made the trip to China and when he returned to the United States.

Hoo Ging Pon testified that the applicant made a practice each year during the Ching Ming Season of visiting the grave of his grandfather at Lung Hill, but that he did not accompany the applicant. The applicant Hoo Gan Tze's testimony is to the effect that he did make a practice of visiting the grave of

his paternal grandparents each year at the Lung Hill during the Ching Ming Season, but he testifies that Hoo Ging Pon accompanied him when he was last in China, and that they were also accompanied by his uncle, Hoo Gim, and his first three sons. (Tr. 42-43.)

The testimony as to the sleeping arrangements does not show any conflict because the periods to which the attention of the various witnesses was directed were different periods and the testimony of each of the witnesses may be correct as to the sleeping arrangements at the particular time to which his testimony was directed.

The testimony as to the space between the houses cannot be said to show any discrepancy.

Hoo Loy, the father, testified that there was a space of about four feet between his house and the 4th house of his row. The testimony of Hoo Ging Pon upon the subject of the space between the houses is not intelligible as the witness evidently indicated something that does not appear in the written answer. In any event, he showed a somewhat large space in front of the house, about three feet in width. Hoo Ngook Lon testified that their house did not touch the 4th house in the row; that there was a little alley in front of their house having space enough for two persons to walk through. Yee Shee testified that the cross-alley in front of their house was about three feet wide. Hoo Gan Tze, the applicant, testified that the space separating their house from the 4th house in their row was about two feet. (Tr. 46-48.)

In regard to the meals, Hoo Ging Pon, the brother, testified that Way Sang and his family did not eat with the other members of his uncle's household; that the meals were sometimes served in the parlor and sometimes in the north side kitchen; that the male members of the family ate first. Hoo Gan Tze testified that the meals in his uncle's house were usually served in the parlor and sometimes they were served in the south kitchen. He further testified that all the members of that household ate their meals together, at the same table, including the Hoo Way Sang family. (Tr. 49-50.)

In regard to the wedding of Hoo Way Hok, Hoo Ging Pon testified that the applicant attended that wedding. The applicant also so testified. Hoo Ging Pon testified that the wedding took place in the 4th house, 2nd row, from the north. The applicant also so testified. Hoo Ging Pon said there was no wedding feast. The applicant testified there was only one wedding feast. (Tr. 50-52.)

In regard to the marriage of the applicant, Hoo Loy, the father of the applicant, testified on October 7, 1931, that the applicant was married in 1928; that he did not remember the month or day, but that the marriage took place at the Tung Sing Village and was to Chin Shee. The applicant testified that he was married on December 21, 1929, at the Tung Sing Village to Chin Shee. As Hoo Loy was in the United States at that time, it is not surprising that he was mistaken as to the year when the marriage took place. (Tr. 52-53.)

Hoo Loy testified that when he left China in 1914 there was no house on the fourth space of the second row from the north; that his brother built a house there about eight years ago. Hoo Ging Pon testified to the erection of a house in the village by the uncle and so does Hoo Gan Tze. (Tr. 54-55.)

It would indeed be very surprising if these witnesses did not differ in some of the matters of detail as appears from this testimony. These discrepancies as to collateral and minor matters rather go to establish the truthfulness of their stories as to the relationship existing between them and the applicant. The witnesses all agree in the important and essential facts relating to the family, their ages, their marital status, their travels, and their present and past whereabouts. The applicant is identified by his father and mother and by his brother and sister. The applicant in turn promptly and convincingly identified each one of these close relatives. The identifications by the witnesses were both by photographs and in person. The prior records of the Government are conclusively favorable to the case of the applicant and there cannot be stronger testimony offered to substantiate his relationship than these records of the Immigration Department. The applicant was born in 1907, and ever since 1911 has been named and claimed and described as a member of the family of Hoo Loy and his wife, Yee Shee, by all members of the family entering or departing from the United States. When the first mention of the applicant was made in 1911 by his father, Hoo Loy, the applicant was a boy four years of age. When the last mention

of the applicant was made by Hoo Ging Pon, returning from China in 1927, the applicant was twenty years of age.

In the summary by the Special Board of Inquiry attached to the petition for the Writ of Habeas Corpus, we find the following, among the reasons given, for rejecting the claim of the applicant:

> "The alleged older brother disagrees with the applicant concerning the location of the houses in their own row, the spaces between the houses in all rows, the location of the two houses belonging to the alleged uncle's family, the number of toilets in the village, and direction in which the toilet doors face, sleeping arrangements in their home prior to 1922, and numerous other features."
>
> (Tr. 14-15.)

An examination of the scattered excerpts of the testimony submitted by the respondent does not permit us to intelligently discuss this claim, but if the witness and his older brother differ concerning the houses in their own row, or the spaces between the houses in all rows or the location of the two houses belonging to the uncle's family or the number of toilets in the village or the direction in which the toilet doors face or in the sleeping arrangements in the house, we are unable to see how their agreement or disagreement on these inconsequential details would in any way be relevant upon the issue whether or not the applicant Hoo Gan Tze is the blood son of Hoo Loy, a native-born American citizen.

The discrepancies, such as there are, are of the character aptly described by Circuit Judge Wilbur in *Hom Chung v. Nagle,* 41 F. (2d), 126, *129,* as follows:

> "The discrepancies which existed between them are fairly attributable to the frailties of human memory, the method of the examination and the difficulties of language; and do not fairly indicate a deliberate conspiracy to obtain a fraudulent entry into the United States as must be the case if the testimony as to the relationship be false."

And as said by the late Circuit Judge Rudkin, in *Weeding v. Lee Gan,* 47 F. (2) 886:

> "While some of these errors may not be readily accounted for, yet, when the record is considered as a whole, it clearly appears that the discrepancies are the result of honest mistake, and nothing more."

As also said by the late Circuit Judge Dietrich, in *Nagle v. Wong Ngook Hong,* 27 F. (2) 650, *651:*

> "Owing to the wide range of the examination of the several witnesses, repetition, and minute detail, the records are voluminous. Certain discrepancies are relied upon by the Commissioner, but we agree with the lower court that they are either only apparent or insignificant. No group of witnesses, however intelligent, honest, and disinterested, could submit to the interrogation to which these witnesses were subjected without developing some discrepancies."

The very fact that there are some discrepancies would serve to indicate the bona fides of the appel-

lant's claim of citizenship. In *Fatjo v. Seidel,* 100 La. 699, 33 So. Rep. 773, it was there said:

> "Sufficient variations crop out, we think, to show that witnesses are not repeating parrot-like a tale learned by rote, but that they are describing what they have seen and heard."

We respectfully submit that the discrepancies appearing in the excerpts appended to the appearance of the respondent are not of sufficient importance to offset the sworn averments in the petition as to the citizenship of the appellant supported as they are by the Immigration Records, themselves extending over a great number of years, and that the judgment of the District Court should be reversed.

Dated, San Francisco,
February 27, 1933.

Respectfully submitted,
FRANK J. HENNESSY,
MARSHALL B. WOODWORTH,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

In the Southern Division of the United States District Court for the Northern District of California.

ORDER.

THE FORM OF PETITIONS FOR WRITS OF HABEAS CORPUS (Particularly in Alien Exclusion and Deportation Cases).

For a considerable period of time prior to October 13, 1928, records of hearings in exclusion and deportation cases by the Immigration Service of the Department of Labor were not available to attorneys of record desiring to prepare petition for writs of habeas corpus, and very considerable latitude has been allowed to such attorneys in preparing such petitions. In many cases orders to show cause have been granted where, upon analysis, the petitions consisted very largely of legal conclusions. Upon the return to the order to show cause, it has been customary for respondent to produce the records in the case, which were then stipulated to be part of the petition.

On October 15, 1928, as shown by a letter addressed by the Acting Commissioner of Immigration for this district to those attorneys known to him as frequently acting as attorneys in exclusion and deportation cases, copies of the records of hearings in such cases were made available to attorneys of record.

In Craemer v. Washington, 168 U. S. 124, 128, the Supreme Court said:

> "By Section 754 of the Revised Statutes it is provided that the complaint in habeas corpus

shall set forth 'the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known.' The general rule is undoubted that if the detention is claimed to be unlawful by reason of the invalidity of the process or proceedings under which the party is held in custody, copies of such process or proceedings must be annexed to or the essential parts thereof set out in the petition, and mere averments of conclusions of law are necessarily inadequate."

This rule was followed in an alien deportation case by the Circuit Court of Appeals for this circuit in Haw Moy v. North, 183 Fed. 89, where, at page 92, the Court said:

"The remaining questions relating to the alleged lack of fairness and good faith on the part of the officers in re-examining the question of the appellant's right to be and remain in the United States cannot be inquired into upon this appeal; the petition for the writ of habeas corpus being insufficient for that purpose. Copies of the warrant of arrest and proceedings under which the appellant is held are not attached or annexed to the petition, nor is the essential part stated, nor is there any cause assigned for any such omission. In this regard the petition is insufficient to enable the court to consider the objection to the proceedings. The general rule is undoubted that, if the detention is claimed to be unlawful by reason of the invalidity of the process or proceedings under which the parties are held in custody, copies of such process or proceedings must

be annexed to or the essential parts thereof set out in the petition, and mere averments of conclusions of law are necessarily inadequate." (Citing Craemer v. Washington, supra.)

The rule was reiterated by the Supreme Court in *Low Wah Suey v. Backus,* 225 U. S. 460, 472:

"The petition would be much more satisfactory if the general rule had been complied with and the proceedings had before the immigration officer had been set out. As a general rule in habeas corpus proceedings a copy of the record of the proceedings attacked is required. (Craemer v. Washington, 168 U. S. 124, 128, 129.) The reasons given for failure to comply with this rule, as stated in the petition, are that the record is too voluminous to be made a part thereof, that to incorporate a copy of the entire proceedings would 'burden the petition and cloud the issue,' that the petitioner was not in the possession of the entire record and was unable to secure it in time to file it with his petition, and that the Commissioner of Immigration had a copy of the record which he could produce with the body of Li A. Sim. It does not appear that a copy of the essential part of the proceedings was not in the possession of the petitioner or could not be had, and so far as it was within his power he should have complied with the rule."

In accordance with the rule thus declared, the records of the hearings being available, counsel are advised that petitions for writs of habeas corpus must set forth the essential part of the proceedings upon

which petitioner relies. For example, in an exclusion case, it should contain the findings of the Board of Special Inquiry, the findings of the Secretary of Labor, and such other portions of the record as petitioner relies on to establish his right to a writ. If any portion of this record, despite the rule of the Immigration Service, is not available to the attorney or record for the petitioner, the facts as to the absence of that part of the record, and the reasons for its non-availability should be fully set forth in the petition. If such portion of the record becomes available subsequent to the filing of the petition, counsel will assist the Court greatly if such record is then set up by way of amendment to the petition.

The facts upon which petitioner relies should in all cases be pleaded as facts and not as conclusions of law. (Rule 50, Rules of Practice, United States District Court, Northern District of California.) The petition should be free of mere argument. If petitioner desires to submit points and authorities with his petition, they should be presented in a separate memorandum.

If the petition is thus properly drawn, the Court will be relieved of a great deal of unnecessary labor in the examination of the original records. The judgment roll will contain an adequate permanent record of the proceedings, which is not now in the case, since the original records of immigration hearings are withdrawn after the final disposition of the case, leaving the record bare of any indication of the basis for the decision upon the petition.

In the event that it appears to the Court that the petition for the writ does not in fact furnish sufficient

information, the Court may, upon its own motion, call for the original record. The Immigration Service will not be requested to produce the original record except under these circumstances. Counsel should discontinue their practice of stating in the petition that they stipulate that the record be considered part of the petition, except where the facts pleaded show that material portions of the record are not in fact available.

Counsel are requested to cooperate with this Court in this matter, to the end that petitions for writs of habeas corpus may be efficiently disposed of, and the undue burden heretofore cast upon the Court by the stipulation of the entire immigration record into the petition may be lightened.

November 28, 1928.

A. F. St. Sure,
United States District Judge,
Harold Louderback,
United States District Judge,
Frank H. Kerrigan,
United States District Judge.